Messrs Kumar Jaspal Quah & Aishah v Dato' Peh Teck Quee

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D6-22-1405 OF 2000
MOHD HISHAMUDIN J
17 FEBRUARY 2003

Civil Procedure — *Affidavits — Cross-examination of person not a deponent to affidavit — Application to cross-examine the defendant's secretary — No affidavit affirmed by defendant's secretary filed by either party — Whether court could order the attendance of defendant's secretary for cross-examination — Rules of the High Court 1980 O38 r 2(3)*

The plaintiff claimed against the defendant for unpaid legal fees and applied for summary judgment. The defendant in opposing the application, denied having agreed to pay the plaintiff any legal fees. The defendant averred that the first time he saw the plaintiff's notes of professional charges was when he read the plaintiff's affidavit in support of the summary judgment application. The plaintiff, in reply averred that the notes of professional charges were sent by hand to the defendant's secretary — one Ms Teh Li Li ('Ms Teh'). The defendant maintained he had never seen such notes. Neither plaintiff nor defendant filed any affidavit sworn or affirmed by the said Ms Teh. The plaintiff filed an application under O 38 r 2(2) of the Rules of the High Court 1980 ('the 'RHC') to cross-examine Ms Teh, which application was dismissed by the senior assistant registrar. The plaintiff appealed.

Held, dismissing the appeal with costs:

(1) The application by the plaintiff to cross-examine Ms Teh was misconceived because by reason of the words in O 38 r 2(3) of the RHC, the court was empowered to order the attendance of Ms Teh for cross-examination *only* if she had sworn an affidavit. In the present case, Ms Teh had not deposed any affidavit. Therefore, the court had no power to order her attendance for cross-examination. In fact, since she had not deposed any affidavit, the question of cross-examination did not arise at all. A party to a proceeding cannot apply to cross-examine a person if in the first place such person has not given any evidence either in the form of oral evidence or in the form of affidavit evidence. In the absence of such *prior* evidence, there is no material on which to cross-examine (see pp 244G–245A); *Gomez v Gomez* [1969] 1 MLJ 228, *Leiserach v Schalit* [1934] 2 KB 353 and *William Horace Sault v Noriah bte Osman* [1950] 16 MLJ 207 distinguished.

(2) None of the affidavits filed by the defendant in the present case exhibited any letter, note or memo written by Ms Teh. Despite the fact that several affidavits were filed by both sides, there was only a brief mention of Ms Teh and her role, and even then it was only in a single two-sentence paragraph (see p 247B–C).

[Bahasa Malaysia summary

Plaintif telah menuntut terhadap defendan yuran guaman yang belum dibayar dan telah memohon penghakiman terus. Defendan dalam menentang permohonan tersebut, telah menafikan bersetuju untuk membayar plaintif apa-apa yuran guaman. Defendan menegaskan bahawa pertama kali beliau melihat nota-nota caj profesional plaintif adalah apabila beliau membaca afidavit sokongan plaintif yang menyokong permohonan penghakiman terus. Plaintif, dalam jawapannya telah menegaskan bahawa nota-nota caj profesional telah diserahkan melalui tangan kepada setiausaha defendan — Ms Teh Li Li ('Ms Teh'). Defendan menegaskan beliau tidak pernah melihat nota-nota tersebut. Kedua-dua plaintif maupun defendan tidak memfailkan apa-apa afidavit yang telah diangkat sumpah atau disahkan oleh Ms Teh. Plaintif telah memfailkan satu permohonan di bawah A 38 k 2(2) Kaedah-Kaedah Mahkamah Tinggi 1980 ('Kaedah-Kaedah tersebut') untuk memeriksa balas Ms Teh, di mana permohonan tersebut telah ditolak oleh penolong kanan pendaftar. Plaintif telah membuat rayuan.

Diputuskan, menolak rayuan dengan kos:

(1) Permohonan oleh plaintif untuk memeriksa balas Ms Teh disalahtafsirkan kerana oleh sebab perkataan-perkataan dalam A 38 k 2(3) KMT, mahkamah mempunyai kuasa untuk memerintahkan kehadiran Ms Teh untuk pemeriksaan balas *hanya* jika beliau telah mengangkat sumpah satu afidavit. Dalam kes semasa, Ms Teh tidak mendeposkan apa-apa afidavit. Oleh itu, mahkamah tiada kuasa untuk memerintahkan kehadiran beliau untuk pemeriksaan balas. Bahkan, memandangkan beliau tidak mendeposkan apa-apa afidavit, persoalan tentang pemeriksaan balas tidak perlu timbul langsung. Satu pihak kepada satu prosiding tidak boleh memohon untuk memeriksa balas seseorang jika seseorang itu tidak memberikan apa-apa keterangan sama ada dalam bentuk keterangan lisan atau dalam bentuk keterangan afidavit. Dengan ketiadaan keterangan *terdahulu* sedemikian, tiada bahan untuk membuat pemeriksaan balas (lihat ms 244G–245A); *Gomez v Gomez* [1969] 1 MLJ 228, *Leiserach v Schalit* [1934] 2 KB 353 dan *William Horace Sault v Noriah bte Osman* [1950] 16 MLJ 207 dibeza.

(2) Tiada daripada afidavit-afidavit yang difailkan oleh defendan dalam kes semasa mengekshibitkan apa-apa surat, nota atau memo yang ditulis oleh Ms Teh. Walaupun hakikatnya beberapa afidavit telah difailkan oleh kedua-dua pihak, hanya sepintas disebutkan tentang Ms Teh dan peranan beliau, dan itupun hanya dalam perenggan dua ayat (lihat ms 247B–C).]

A **Notes**

For cases on cross-examination of person not a deponent to affidavit, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) para 338.

B **Cases referred to**

Gomez v Gomez [1969] 1 MLJ 228 (distd)
Leiserach v Schalit [1934] 2 KB 353 (distd)
William Horace Sault v Noriah bte Osman [1950] MLJ 207 (distd)

C **Legislation referred to**

Supreme Court Rules [Eng] O LII r 4
Rules of the High Court 1980 O 14, O 38 r 2(3)
Rules of the Supreme Court 1957 O 38 r 1

V Ravindran (*Kumar Jaspal Quah & Aishah*) for the plaintiff.
D *K Ramesh* (*Chellam Wong*) for the defendant.

Mohd Hishamudin J: This is an appeal against the decision of the learned Senior Assistant Registrar of the High Court of Kuala Lumpur (Commercial Division).

In her decision of 9 February 2001, the learned senior assistant registrar E ('the Registrar') dismissed the plaintiff's application to 'cross-examine' the defendant's secretary, one Ms Teh Li Li ('Ms Teh'), for the purpose of the hearing of the plaintiff's application for summary judgment against the defendant pursuant to O 14 of the Rules of the High Court 1980 ('the RHC').

F The application to cross-examine Ms Teh was made pursuant to O 38 r 2(3) of the RHC.

Order 38 r 2(3) reads:

> (3) In any cause or matter begun by originating summons, originating motion or petition, and on any application made by summons or motion, evidence may be given by affidavit unless in the case of any such cause, G matter or application any provision of these rules otherwise provides or the Court otherwise directs, but the Court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court.

H In the present case, the plaintiff claims against the defendant for unpaid legal fees in respect of professional services allegedly rendered by the plaintiff to the defendant.

The defendant in his affidavit at encl 5 (in opposing the plaintiff's application for summary judgment) denies agreeing to pay any legal fee to I the plaintiff and avers that the professional services were rendered by the plaintiff to some other parties (which the defendant named) and not to the defendant and as such the claim should be made to those parties. The

defendant further avers that the first time he saw the plaintiff's notes of professional charges was when he read the plaintiff's supporting affidavit (encl 4) in the O 14 application. In his affidavit at encl 5, the defendant states:

> 10 Oleh yang demikian, saya menafikan berhutang kepada plaintif untuk jumlah yang dituntut tersebut. Saya juga mengatakan bahawa semasa saya meneliti kandungan affidavit plaintif, itulah kali pertama saya melihat nota-nota yuran professional plaintif.

In their affidavit in reply at encl 6, the plaintiff, however, avers that the notes of professional charges were given by hand to the defendant's secretary. The plaintiff alleges that the averment in para 10 of the defendant's affidavit at encl 5 is a lie. Plaintiff's affidavit containing these allegations reads as follows:

> 6 Berkenaan perenggan 10 afidavit tersebut, saya menyatakan bahawa nota-nota professional tersebut telah diberi kepada setiausaha pihak defendan iaitu Cik Teh Li Li secara serahan tangan. Oleh demikian, pengataan pihak defendan adalah bohong.

In his affidavit in reply (at encl 6A), the defendant maintains that he has never seen those notes of professional charges. His affidavit states:

> 6 Sebagai jawapan kepada perenggan 6 afidavit jawapan tersebut, saya mengulangi perenggan 10 afidavit jawapan defendan dan mengatakan bahawa saya tidak pernah menerima nota-nota professional tersebut.

It is important to note that there is no affidavit by Ms Teh filed by either party.

Thereafter, by summons in chambers (encl 7), the plaintiff made an application to cross-examine the said Ms Teh pursuant to O 38 r 2(3). The Registrar dismissed the application. Hence, this appeal to the judge in chambers.

In his argument before me at the hearing of this appeal, the learned counsel for the appellant/plaintiff relies on:

(1) *Leiserach v Schalit* [1934] 2 KB 353;

(2) *William Horace Sault v Noriah bte Osman* [1950] 16 MLJ 207; and

(3) *Gomez v Gomez* [1969] 1 MLJ 228.

In my judgment, this application by the plaintiff to cross-examine the said Ms Teh is misconceived because by reason of the words:

> ... the court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit ...

in O 38 r 2(3), I have the power to order the attendance of Ms Teh for cross-examination *only* if she had sworn an affidavit. But in the present case, as has been noted, Ms Teh had not deposed any affidavit. Therefore, I have no power to order her attendance for cross-examination. In fact, in the first place, since she had not deposed any affidavit, the question of cross-examination does not arise at all. A party to a proceeding cannot apply to

A cross-examine a person if in the first place such person has not given any evidence either in the form of oral evidence or in the form of affidavit evidence. For, in the absence of such *prior* evidence, there is no material on which to cross-examine.

The case of *Leiserach v Schalit*, cited by the plaintiff's counsel, is not B relevant for three reasons. First, the application in that case was not made pursuant to a rule of procedure that is in pari materia to our O 38 r 2(3) of the RHC, although in the submission the learned counsel for the applicant did refer to O LII r 4 of the English Supreme Court Rules. This is clear from the law report where the relevant part says:

C > Croom-Johnson KC and BB Stenham (Frank Whitworth with them) for Schalit in support of the application: On a motion to set aside an award the Court has jurisdiction to allow the arbitrator to be called as a witness in regard to the matter which passed before him during the arbitration: see *In re Whiteley and Roberts Arbitration* [1891] 1 Ch 558, and *Buccleuch (Duke) v Metropolitan Board of Works* [1872] L R 5 H L 418. On such an application Order LII r 4 does not exclude evidence other than by affidavit.

D

Second, the application (by way of notice of motion) in the case cited was not to *cross-examine* the deponent of an affidavit, or to cross-examine anyone, but to call two arbitrators *as witnesses* in regard to disputed matters in an application to set aside an arbitration award.

E Third, Humphrey J in his brief judgment did not base his decision on any rule and in fact did not even refer to any rule. The judgment was based purely on a legal principle: that although as a general rule the proceeding on a motion should be by way of affidavits, nevertheless, the court should allow an application to call witnesses to supplement affidavit evidence if in the light of the exceptional circumstances of the case the court considers it F appropriate to do so in order to ascertain the true facts and to do justice to the parties. This is what the learned judge said (at p 355):

> This is a case in which the Court has listened to numerous affidavits, statements in some of which directly contradict the statements in others. It is also a case which it is essential, in order to do justice, that the Court should G be enabled to make up its mind as to the actual facts of the case. In the view of the Court this is an exceptional case, and in this exceptional case the Court has arrived at the conclusion that the only way in which it can satisfactorily deal with the matter before it, is by having the assistance of the evidence of the arbitrators, who, being independent persons, can tell the Court what it is unable to ascertain from a perusal of the affidavits on one side and the other H — namely, what are the essential facts of the case. On that ground and on that ground only the Court accedes to the application to call as witnesses both the gentlemen who acted as arbitrators in the matter.

Likewise, *William Horace Sault* can also be distinguished. In this case cited, it was not an application by a party to cross-examine a witness or to cross-examine anyone but an application to call witnesses to prove that the I repayment of mortgage debt had been compelled by duress. The application was made orally by counsel for the respondent at the commencement of the hearing of the originating motion (the main action);

however, learned counsel did not cite any particular rule on which his application was based. Pretheroe J, although was of the view that he had the power to call witnesses in an exceptional case, nevertheless, after having given due consideration to the facts and the merit of the application before him, rejected the application. The learned judge did not base his view on any particular rule of procedure but rather on the principle enunciated in *Leiserach v Schalit.*

In *Gomez v Gomez*, a woman (W) by way of divorce petition successfully obtained a divorce from her husband (H). W was granted custody of a child. Both W and H were Catholics. After the divorce, W remarried a man professing the Hindu faith. H, by summons in chambers, made an application to vary the order of custody of the child on the ground that W, by remarrying a Hindu, was no longer a fit and proper person to have custody of the child. H now wanted custody of the child. In opposing the application, W, in her affidavit exhibited a letter written by an assistant priest, one Reverend Father Wood of St Francis Xavier's Church, addressed to 'To Whom It May Concern' stating that W was still capable of taking care of the child's religious and moral upbringing and that her remarriage placed no obstacle to W and her child practising their Catholic faith. Invoking O 38 r 1 of the Rules of the Supreme Court 1957 (which has been repealed and now replaced by the present RHC) H applied to cross-examine the said Reverend Father Wood. Like the present case, Reverend Father Wood did not depose any affidavit. Raja Azlan Shah J (as he then was) allowed the application, basing on O 38 r 1 of the Rules of the Supreme Court 1957 ('the RSC 1957') which, in effect, is similar to the present O 38 r 2(3) of the RHC. Order 38 r 1 of the RSC 1957 provides that:

> ... a judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit.

In allowing the application, his Lordship ruled that the Reverend could be cross-examined because as his letter had been exhibited by W's affidavit it was the same as if he had sworn an affidavit. In the words of the learned judge (at p 230):

> In the present case there is only one issue, that is, the issue in the pending action which is whether the order of custody can be varied. The matter raised in the three affidavits are all matters relating to the action. The applicants that the respondent is no longer a fit and proper person to have custody of the child. The respondent says that she is still capable of looking after the child's religious and moral upbringing. The Rev Father Wood supports her. It is the same as if he has sworn an affidavit to that effect. It is therefore only fair and proper that the appellant be allowed to cross-examine them on their affidavits.

In all humility and with the greatest respect, I am unable to share his Lordship's view. In my opinion, since the said Reverend Father Wood had not sworn an affidavit, the court had no power under O 38 r 1 of the RSC 1957 to order him to the attend the proceeding for cross-examination. To my mind, the provision is clear on this point. Moreover, in the absence of an affidavit by him, there was nothing for the opposing party to cross-

examine. In my view, it is rather far fetched to say that by exhibiting the Reverend's letter in W's affidavit it is the same as if the said Reverend himself had sworn an affidavit. It is a fact that he had not sworn an affidavit and the mere exhibition of (allegedly) his letter by the W's affidavit could not alter that fact.

In any case, the facts of the case before me can be distinguished from the facts of *Gomez v Gomez*. Unlike in *Gomez v Gomez*, where a letter allegedly written by the person whom the applicant sought to cross-examine was exhibited in the applicant's affidavit, none of the affidavits filed by the defendant in the present case exhibits any letter, note or memo written by Ms Teh. As has been pointed out above, despite the fact that several affidavits were filed by both sides, there was only a brief mention of Ms Teh and her role, and even then it was only in a single two-sentence paragraph — para 6 of encl 6.

Accordingly, this appeal is dismissed with costs.

Appeal dismissed with costs.

Reported by Ezatul Zuria Azhari